UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GORDON A. BIGGER, Appellant, v. DEPARTMENT OF HOMELAND SECURITY, Agency.	DOCKET NUMBER SF-0752-17-0004-I-1 DATE: April 13, 2023

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Jeremy Thompson, Las Vegas, Nevada, for the appellant.

Eileen Dizon Calaguas, Esquire, San Francisco, California, for the agency.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which sustained his removal. Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. Except as expressly MODIFIED by this Final Order to appropriately consider the appellant's potential for rehabilitation and to find that the agency's penalty determination is not entitled to deference, we AFFIRM the initial decision, still sustaining the removal.

BACKGROUND

¶2 The appellant was formally employed as a Federal Air Marshal (FAM) with the Transportation Security Administration (TSA) at the Department of Homeland Security (DHS). Initial Appeal File (IAF), Tab 7 at 142. FAMs such as the appellant serve as law enforcement officers and are issued a firearm, badge, and credentials. *Id.* at 172. Agency policy encourages off-duty carrying of a firearm. *Id.* at 174.

¶3 In 2015, while off duty, the appellant witnessed two men who had previously broken into his garage entering another home across the street. Hearing Transcript (HT) at 78 (testimony of the appellant). The appellant instructed his wife to call 911, and he obtained his agency-issued firearm, badge, and handcuffs. *Id.* The appellant approached the two suspects, displaying his badge and credentials. HT at 80. He verbally instructed the two to stop and get on the ground. HT at 79. Undeterred, both suspects continued in the appellant's direction, and the appellant then drew his weapon. HT at 81. As the men continued within 21 feet of the appellant, one of the suspects facetiously asked

the appellant if he was going to shoot him. *Id.* The suspects continued to move closer to the appellant, within about 11 to 12 feet, and the appellant, who stated that he felt challenged and threatened at that point, fired a warning shot into the ground. HT at 82. This enabled the appellant to detain the suspects momentarily, but after hearing sirens in the vicinity, they attempted to escape. HT at 83-84. As the suspects were fleeing, the appellant attempted to chase after them and fired an accidental shot. HT at 85-86. After ensuring that everybody in the vicinity was safe and unharmed, the police arrived and eventually apprehended the suspects. HT at 87.

¶4 As a result of this incident, the agency conducted an internal investigation, during which the appellant was interviewed by the Office of Inspection. IAF, Tab 7 at 210. On May 13, 2016, the agency proposed the appellant's removal on one charge of off-duty misconduct (two specifications). *Id.* at 142. Specification one asserted that while the appellant was off duty, he discharged his agency-issued firearm as a "warning shot" at subjects he suspected were involved in a burglary and that warning shots are prohibited under the agency's policy on Use of Force and Firearms, TSA Management Directive (MD) 3500.2. *Id.* at 142-44. Specification two asserted that during the same incident, the appellant accidentally discharged his firearm while running after the subjects in violation of TSA MD 3500.2, which also prohibits careless handling or misuse of firearms. *Id.* at 144. After the appellant provided both oral and written replies, the agency issued a final decision sustaining the proposed removal. *Id.* at 25-34.

¶5 The appellant timely appealed his removal to the Board arguing, among other things, that he was not prohibited from firing a warning shot while off duty, that the agency misapplied its table of penalties, and that the deciding official did not adequately consider any mitigating factors.[2] IAF, Tab 1 at 12-13. The

[2] The appellant also argued in his initial appeal that the agency committed a prohibited personnel practice by removing him because of his age. IAF, Tab 1 at 12. The appellant later withdrew this claim. IAF, Tab 16 at 2.

administrative judge held a hearing and issued an initial decision finding that the agency proved both specifications of the charge and that the penalty of removal was reasonable and promoted the efficiency of the service. IAF, Tab 21, Initial Decision (ID) at 8-13, 15-20. She also found that the appellant failed to prove his affirmative defenses, and she affirmed the removal action. ID at 13-15, 20.

¶6 The appellant has filed a petition for review arguing that the administrative judge failed to consider relevant U.S. Court of Appeals for the Federal Circuit case law and improperly analyzed the agency's table of penalties and the appellant's potential for rehabilitation. Petition for Review (PFR) File, Tab 1 at 3-8. The agency has filed a response to the appellant's petition. PFR File, Tab 3.

DISCUSSION OF ARGUMENTS ON REVIEW

¶7 The TSA is not subject to the provisions of chapter 75. *See Winlock v. Department of Homeland Security*, 110 M.S.P.R. 521, ¶ 5 (2009), *aff'd per curiam*, 370 F. App'x 119 (Fed. Cir. 2010). Instead, its MD 1100.75-3, "Addressing Unacceptable Performance and Conduct," applies to this appeal. *Id.*, ¶ 6 (citing to MD 1100.75-3, title of "Addressing Conduct and Performance Problems"). Under MD 1100.75-3, the agency must prove by preponderant evidence that its action is for such cause as will promote the efficiency of the service, that there is a nexus between a legitimate Government interest and the matter that forms the basis for the action, and that the penalty is appropriate, taking into account the relevant mitigating factors and any other relevant considerations. *Winlock*, 110 M.S.P.R. 521, ¶ 11 (citing 5 U.S.C. § 7701(c)(1)(B), which remains applicable to the TSA under 49 U.S.C. § 40122(g)(2), for the preponderance of the evidence standard).

The agency proved both specifications of the charge of off-duty misconduct by preponderant evidence.

¶8 In his appeal, the appellant argued that the agency failed to prove specification one of the charge because he was off duty at the time of the misconduct and the agency's prohibition of warning shots was not applicable while he was off duty. IAF, Tab 8 at 6. The administrative judge addressed this argument below and determined that agency policy, TSA MD 3500.2, applied to the appellant regardless of whether he was on or off duty, and therefore, his warning shot constituted a violation of that policy. ID at 9-11.

¶9 In making this finding, the administrative judge acknowledged that the DHS's Use of Deadly Force Policy appears to apply only to those "performing law enforcement missions." ID at 9; IAF, Tab 7 at 167. However, she noted that the DHS policy explicitly provides agency directorates with the authority to supplement the policy with an additional policy statement or guidance, which the TSA did by issuing TSA MD 3500.2. ID at 9; IAF, Tab 7 at 168, 170-78. She noted that TSA MD 3500.2 makes reference to both on- and off-duty situations, which she interpreted to suggest that it applied beyond the confines of the appellant's on-duty time. ID at 9-10. She further found that the policy's authorization for a FAM to "use all means of force that are available to protect [himself] and others consistent with the threat" faced in an emergency did not negate the specific prohibition of certain types of use of force such as the prohibition of warning shots. ID at 10.

¶10 On review, the appellant reiterates his argument that the prohibition against warning shots did not extend to off-duty conduct. PFR File, Tab 1 at 3-5. He relies on *Grafton v. Department of the Treasury*, 864 F.2d 140 (Fed. Cir. 1988), wherein the Federal Circuit found that the administrative judge erred in her interpretation of an agency's policy on the question of whether a prohibition on warning shots applied to off-duty conduct. *Id.* at 142. The policy at issue in that case discussed the "Carrying of Firearms" and stated that firearms are to be used

only if there is a danger of loss of life or serious bodily injury and that warning shots were prohibited. *Id.* The policy went on to state immediately thereafter that when firearms are fired by a special agent in the performance of duty, such incident will be reported verbally to the special agent in charge as soon as possible. *Id.* The court reasoned that if the former provision intended to apply to the off-duty use of firearms, the latter provision "would logically have required the reporting of that off-duty use, not simply the reporting of use 'in the performance of duty.'" *Id.* Ultimately, the court found that the policy at issue did not include a prohibition on off-duty warning shots and set aside the administrative judge's decision to the contrary. *Id.*

¶11 We find the appellant's reliance on *Grafton* to be misplaced. Here, TSA MD 3500.2 references warning shots under the "Restrictions on the Use of Force" section. IAF, Tab 7 at 173. Unlike *Grafton*, however, there is no immediate follow-up to that provision that differentiates between on- and off-duty conduct. *Id.* at 172-73. Moreover, although TSA MD 3500.2's "Use of Force Policy" section states that "[i]n an emergency situation, whether on or off-duty, [law enforcement officers] are authorized to use all means of force that are available to protect themselves and others consistent with the threat faced," we agree with the administrative judge that this language does not negate the prohibition of warning shots because the prohibition itself indicates that it is not a "means" that is "available" to a FAM.

¶12 In elaborating on its finding, the court in *Grafton* also stated that if the limitation on the use of firearms in situations in which there is a danger of loss of life or serious bodily injury was applied broadly to the off-duty use of firearms, "special agents would be prevented from using firearms for activities such as hunting and target shooting." *Grafton*, 864 F.2d at 142. The appellant argues that if the policy here is construed to apply to off-duty conduct, the same result would occur—preventing the use of firearms for hunting and target shooting. PFR File, Tab 1 at 5. We find this argument to be unpersuasive because it is clear

that the court's discussion of hunting and target shooting is directed at other language pertaining to the "danger of loss of life or seriously bodily injury" and not the prohibition on warning shots. *Grafton*, 864 F.2d at 142.

¶13 Based on the foregoing, we agree with the administrative judge's conclusion that the agency proved specification one by preponderant evidence. The appellant does not appear to contest the administrative judge's findings regarding specification two. PFR File, Tab 1 at 3-9. We have reviewed the record and find no reason to disturb those findings here. Accordingly, we find that the administrative judge properly sustained the charge.

The agency did not commit harmful procedural error.

¶14 The appellant also argues on review that the agency committed a harmful procedural error because it incorrectly applied its table of penalties to justify the removal action. PFR File, Tab 1 at 6-7. Procedural error warrants reversal of an agency's action when the appellant establishes that the agency committed a procedural error that likely had a harmful effect on the outcome of the case before the agency. *Powers v. Department of the Treasury*, 86 M.S.P.R. 256, ¶ 10 (2000); 5 C.F.R. § 1201.56(c)(1).

¶15 Specifically, the appellant argues that the agency erred when it construed his warning shot as an unnecessary discharge of a weapon "where there [was] apparent danger to human life," which provides for a recommended penalty of removal. PFR File, Tab 1 at 6-7; IAF, Tab 7 at 268. He asserts that the warning shot should have been construed as an unnecessary discharge of a weapon "where there is no apparent danger to human life," because he was "an expert marksman" and "was cognizant of the area around the target area." PFR File, Tab 1 at 6-7. This construction provides for a recommended penalty range of a 14-day suspension to removal. IAF, Tab 7 at 268.

¶16 We find the appellant's argument unpersuasive. Either categorization includes removal as a reasonable penalty, and although the appellant's categorization includes removal only as the aggravated penalty, the agency's

guidelines on applying the Table of Offenses and Penalties state that if the appellant has committed more than one offense, the proposing and deciding officials may consider whether the penalty should be in the aggravated penalty range corresponding to the most serious offense charged. IAF, Tab 7 at 265. Here, the appellant committed an additional offense when he accidentally discharged his firearm as outlined in specification two of the charge. *Id.* at 25-28. Thus, regardless of whether the appellant's warning shot presented an apparent danger to human life, the penalty of removal would still be within the range contemplated by the agency's Table of Offenses and Penalties. *Id.* at 267-68. Accordingly, we find that the agency did not commit harmful error in the application of its Table of Offenses and Penalties.[3]

The penalty of removal was reasonable.

¶17 When the Board sustains all of the charges, it will review an agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Archerda v. Department of Defense*, 121 M.S.P.R. 314, ¶ 25 (2014); *Stuhlmacher v. U.S. Postal Service*, 89 M.S.P.R. 272, ¶ 20 (2001). In determining whether the selected penalty is reasonable, the Board defers to the agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency. *Archerda*, 121 M.S.P.R. 314, ¶ 25. Thus, the Board will modify a penalty only when it finds that the agency failed to weigh the

[3] Moreover, an agency's table of penalties is only one factor to be considered in assessing the reasonableness of a penalty. *Phillips v. Department of the Interior*, 95 M.S.P.R. 21, ¶ 17 (2003), *aff'd*, 131 F. App'x 709 (Fed. Cir. 2005). It is well established that an agency's table of penalties is merely a guide and is not mandatory unless the agency has a specific statement making the table mandatory and binding rather than advisory. *Id.*; *see also Farrell v. Department of the Interior*, 314 F.3d 584, 590-92 (Fed. Cir. 2002). Here, the agency's Table of Offenses and Penalties explicitly states that it is "intended to provide guidance" and "does not replace supervisory judgment for determining appropriate penalties." IAF, Tab 7 at 264.

relevant factors or that the penalty the agency imposed clearly exceeded the bounds of reasonableness. *Id.*

¶18 Here, the deciding official considered the nature and seriousness of the misconduct and its relationship to the appellant's duties as a FAM. IAF, Tab 7 at 30; HT at 16 (testimony of the deciding official). She also discussed that as a law enforcement officer, the appellant is held to a higher standard than non-law enforcement employees. IAF, Tab 7 at 30. She also considered as other aggravating factors the appellant's disciplinary history and the fact that he was on notice of the appropriate procedures. *Id.*; HT at 16-17. She considered as mitigating factors the appellant's 20 years of Federal service, character references, and positive performance history. IAF, Tab 7 at 30; HT at 18-19. The deciding official also discussed the appellant's potential for rehabilitation. IAF, Tab 7 at 30; HT at 19. She determined that the appellant lacked potential for rehabilitation because, despite acknowledging that, in hindsight, he would have acted differently, IAF, Tab 7 at 30, his responses to the proposal notice reflected his belief that his actions were appropriate under the circumstances. HT at 19-20.

¶19 The administrative judge provided a comprehensive discussion of the deciding official's penalty analysis and found that while she conscientiously considered the mitigating factors, the seriousness of the charge outweighed those factors. ID at 19. Specifically, regarding the appellant's potential for rehabilitation, the administrative judge found that "while reasonable minds may differ as to whether the appellant's behavior reflects genuine remorse and a capacity for rehabilitation, [the deciding official's] assessment of the appellant's potential for rehabilitation was reasonable under the circumstances and supported by the evidence." ID at 17.

¶20 On review, the appellant argues that the deciding official and the administrative judge incorrectly assessed his potential for rehabilitation. PFR File, Tab 1 at 7-8. He argues that his explanation as to what occurred does

not suggest that he is not remorseful or that he lacks the potential for rehabilitation. *Id.* at 8. He also reiterates that in his response to the deciding official, he took full responsibility for his actions. *Id.*; IAF, Tab 11 at 38.

¶21 We agree with the appellant that the deciding official inappropriately assessed his potential for rehabilitation. The Board has held that an appellant's denial of wrongdoing cannot be used in determining the reasonableness of the penalty. *Jefferson v. U.S. Postal Service*, 73 M.S.P.R. 376, 383 (1997). Here, the deciding official's conclusion that the appellant lacked potential for rehabilitation is mostly based on his insistence that, at the time, he believed his actions were reasonable and that he did not act improperly. IAF, Tab 7 at 30-31; HT at 19-20. Thus, we find that the deciding official erred in her assessment of the appellant's potential for rehabilitation when she cited his defense of his actions to conclude that this factor cut against him.

¶22 Because the deciding official failed to appropriately consider the appellant's potential for rehabilitation, a factor that she deemed relevant by explicitly discussing it in the removal notice, the agency's penalty determination is not entitled to deference and we modify the initial decision accordingly. *Von Muller v. Department of Energy*, 101 M.S.P.R. 91, ¶¶ 18-21, *aff'd*, 204 F. App'x 17 (Fed. Cir. 2006), *and modified on other grounds by Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657 (2010), *overruled on other grounds by Singh v. U.S. Postal Service*, 2022 MSPB 15. Nonetheless, we find that, due to the seriousness of the appellant's misconduct and the nature of his position as a law enforcement officer, the penalty of removal is within the bounds of reasonableness. *Martin v. Department of Transportation*, 103 M.S.P.R. 153, 157 (2006) (stating that, in assessing whether the agency's selected penalty is within the tolerable limits of reasonableness, the most important factor is the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities), *aff'd*, 224 F. App'x 974 (Fed. Cir. 2007). Accordingly, we will not disturb the agency's selected penalty of removal.

¶23 Based on the foregoing, we find that the administrative judge properly sustained the removal action, and we affirm the initial decision, as modified.

NOTICE OF APPEAL RIGHTS[4]

The initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. 5 C.F.R. § 1201.113. You may obtain review of this final decision. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(A).

[4] Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of

discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after you receive this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or

other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.[5] The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The

[5] The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD: /s/ for

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.